FILED
DEC 3 1979
MICHAEL ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-708.

PHILADELPHIA FOOD STORE EMPLOYERS' LABOR COUNCIL,

Petitioner,

v.

RETAIL CLERKS INTERNATIONAL ASSOCIATION LOCALS 1349, 1358, 1360, 1361, 1371 and 1393,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HOWARD S. SIMONOFF,
STEVEN K. KUDATZKY,
TOMAR, PARKS, SELIGER, SIMONOFF & ADOURIAN,
41 South Haddon Avenue,
Haddonfield, New Jersey. 08033

Attorneys for Respondents, Retail Clerks International Association Locals 1349, 1358, 1360, 1361, 1371 & 1393.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
COUNTERSTATEMENT OF THE QUESTION PRESENTED	1
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
I. A Case Whose Disposition Turns on the Resolution of a Disputed Factual Issue Is Inappropriate for Review by This Court	4
II. The Standards of Judicial Review of Labor Arbitration Awards in the Third Circuit Are Faithful to the Tenets of *Enterprise Wheel* and Are Not in Conflict With Those Employed in Other Circuits	6
CONCLUSION	9

TABLE OF AUTHORITIES.

Cases:	Page
Amal. Meatcutters v. Cross Bros., 518 F. 2d 1113 (3d Cir. 1975)	6
Baltimore Regional Joint Board v. Webster Clothes, Inc., 56, 596 F. 2d 95 (4th Cir. 1979)	7
Detroit Coil Co. v. IAM, 594 F. 2d 575 (6th Cir. 1979)	7
Drivers' Local 89 v. Hays & Nicoulin, Inc., 594 F. 2d 1093 (6th Cir. 1979)	7
Local 103, I. U. E. v. RCA Corp., 516 F. 2d 1336 (3d Cir. 1975)	6
Ludwig Honold Mfg. Co. v. Fletcher, 405 F. 2d 1123 (3d Cir. 1969)	6, 7, 8
Monongahela Power Co. v. IBEW, 566 F. 2d 1196 (4th Cir. 1976)	7
N. F. & M. Corp. v. United Steelworkers, 524 F. 2d 756 (3d Cir. 1975)	6, 7
Storer Broadcasting Co. v. AFTRA, 600 F. 2d 45 (6th Cir. 1979)	7
Teamsters Local 30 v. Helms Express Inc., 591 F. 2d 211 (3d Cir. 1979)	6
Teamsters Local 249 v. Western Pennsylvania Motor Carriers Ass'n, 574 F. 2d 783 (3d Cir. 1978)	6
United Steelworkers v. Enterprise Wheel and Car Corp., 363 U. S. 564 (1960)	1, 5, 6, 7, 8
Westinghouse Electric Corp. v. IBEW, Local 1805, 561 F. 2d 521 (4th Cir. 1977)	7

Retail Clerks International Association Locals 1349, 1358, 1360, 1361, 1371 and 1393 submit this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit filed by the Philadelphia Food Store Employers' Labor Council. Respondents respectfully request that the Court deny the petition for the reasons stated herein.

COUNTERSTATEMENT OF THE QUESTION PRESENTED.

Should this Court burden its already swollen docket by undertaking to amplify upon the well-settled principles of judicial review of labor arbitration awards set forth in *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960), on the basis of a spurious "conflict" among decisions of the several courts of appeals in the application of *Enterprise Wheel's* "essence test" in the context of a case decided in total conformity with those principles which has a factual setting so idiosyncratic that the precedential value of any ruling by this Court would be minimal at best.

COUNTERSTATEMENT OF THE CASE.

Respondents respectfully refer the Court to the opinion of the Court of Appeals herein for an accurate portrayal of the relevant facts of this case and the rulings of the District Court and the arbitrator. A5-7.

Moreover, respondents strongly take exception to the unfairness of the factual presentation made by petitioner to this Court concerning the alleged "agreement" between the parties that a finding of "offensive employer action" was required before the arbitrator could rule that the store

closings constituted a lockout. Petitioner has again here, as it did in the courts below, disregarded the context and intended meaning of language by seizing upon the parties' coincident use of the words "offensive employer action" in their briefs to the arbitrator as the basis for the claimed existence of an agreement between the parties, said to be in the nature of a joint submission agreement, which the arbitrator disregarded in making his ruling in favor of respondents. The best that can be said about petitioner's factual presentation to this Court is that it is less disingenuous than that made to the Court of Appeals, where petitioner characterized what it now calls an "agreement" as a stipulation between the parties. That claim was so devoid of factual support that the Court of Appeals did not even deem it worthy of explicit rejection.

The truth of the matter is that the alleged "agreement" as to the elements of a lockout exists only in the mind of petitioner, whose perception is tainted to no small degree by wishful thinking. As the even most cursory reading of the respective briefs of Acme Markets and respondents to Arbitrator Gill reveals, the parties were in sharp dispute about just what constituted "offensive employer action," despite their common use of those words. Acme took the narrow view that an "offensive shutdown" was one undertaken as a bargaining weapon "for the purpose of securing economic concessions." A36. Respondents viewed the concept of an "offensive" shutdown more liberally, defining it succinctly in the last paragraph of their brief as a store closing undertaken "without economic justification," (A57), which would only exist if the supermarket could not be profitably operated without a meat department. Respondents argued to the arbitrator that no showing of such an economic justification could be made by the two supermarket chains.

As noted in the Court of Appeals' opinion, the arbitrator's analysis of the "lockout" issue submitted to him was essentially congruent with the approach proffered by respondents. A6. Just as respondents had argued that any shutdown without economic justification was "offensive employer action" and therefore a "lockout," the arbitrator reasoned that any store closings for other than economic reasons constituted "strategic" action by the food stores and therefore constituted a contractually-proscribed "lockout." Finding no economic justification on the record before him, the arbitrator concluded that the store closings were "strategic" and ruled that the two supermarket chains had breached their "no-lockout" promise to respondents by shutting down their operation and denying work to their Retail Clerk employees.

The arbitrator's analysis of the lockout issue substantially dovetailed with that advanced by respondents, although it concededly did not parrot it *in haec verba*. The respective definitions of "offensive employer action" utilized by petitioner and respondents in their briefs to the arbitrator were radically variant. To the extent there was any "agreement" in this case, there was a far greater degree of conceptual "agreement" on the definition of a "lockout" between respondents and the arbitrator than there was between respondents and the petitioner. Petitioner's claim that a *de facto* submission agreement was made between the parties is simply untenable on the record of this case. Hence, the question asserted to be at the core of this case is not truly presented at all. Despite the absence of the foundational fact of an actual agreement between the parties which limited the decisional authority of the arbitrator, petitioner has nevertheless attempted to manufacture such an agreement *ex nihilo* by strength of assertion in order to create a "cert-worthy" issue in this case where none exists.

REASONS FOR DENYING THE WRIT.

I. A Case Whose Disposition Turns on the Resolution of a Disputed Factual Issue Is Inappropriate for Review by This Court.

Petitioner's only cognizable claim of legal error which pertains to this particular case, as opposed to its wide-ranging attack on the Third Circuit's policy in reviewing arbitration awards, is its contention that the Court of Appeals erred in failing to defer to the factual finding of the District Court as to the arbitrator's disregard of the asserted mutual intent of the parties concerning the definition of a "lockout." Petitioner's complaint that the Court of Appeals "did not even bother to address" the validity of that finding and that its refusal to affirm same was tantamount to sanctioning the arbitrator's dispensation of "his own brand of industrial justice."

The ruling of the Court of Appeals herein of course permits no such result. The linchpin of petitioner's arguments is the existence of the "agreement" between the parties on the elements of a lockout. It was that alleged manifestation of the parties' intent which the arbitrator was found to have improperly disregarded by the District Court. However, as demonstrated in the discussion of the facts of this case at the beginning of this brief, only by the most mechanical exaltation of form over substance can the District Court's finding of such an "agreement" be viewed as having even a scintilla of evidentiary support.

The decision of the Court of Appeals must be read as having reversed that finding by necessary implication. The appellate court specifically noted that the District Court had ruled that the arbitrator had ignored the intent of the parties respecting the interpretation of "lockout" as used in the collective bargaining agreement. A6. The Court of Appeals ruled, however, that the "*interpretation*

of [that] term was clearly within the scope of the issue submitted to the arbitrator * * *." A7 (emphasis added). No such conclusion would have been drawn by the Court of Appeals had it found any merit in the contention that an "agreement" between the parties precluded "interpretation" of the meaning of "lockout" by the arbitrator. The Court of Appeals must be viewed as having implicitly reversed the District Court's finding that the parties had "agreed" to a definition of "offensive employer action" which the arbitrator was bound to follow.

Few would seriously dispute the view that a labor arbitrator improperly exceeds his authority if he defies a stipulation or submission agreement made between the disputant parties. *Enterprise Wheel* has authoritatively resolved any doubts on that point and there has been no discernable trend in the Third Circuit or elsewhere toward judicial sanctioning of such arbitral overreaching. Assuming the undisputed existence of such an agreement in this case, there would be no need for this Court to undertake to expand upon the teachings of *Enterprise Wheel*, as the result would follow *a fortiori*. The only dispute in this case is over the issue of *whether any such agreement existed* between the parties. If one did not, the result below is undeniably correct; if one did, the result below should have differed. It is rather inappropriate to call upon the Supreme Court of the United States to step in to resolve what is no more than a factual dispute in a case which would be clearly controlled by well-settled law no matter which way that dispute came out. The disposition of such relatively insignificant issues is entrusted to the Courts of Appeals under the federal court system. The Third Circuit has acted to correct the error of the District Court herein and its decision adheres to the governing legal principles set forth by this Court. Its ruling herein should not be disturbed.

II. The Standards of Judicial Review of Labor Arbitration Awards in the Third Circuit Are Faithful to the Tenets of *Enterprise Wheel* and Are Not in Conflict With Those Employed in Other Circuits.

Because the issue presented by the case *sub judice* is unlikely to attract the interest of this Court, petitioner has attempted to enhance its chances of securing review in this Court by attacking the "policy" of the Third Circuit regarding enforcement of labor arbitration awards as manifesting an infidelity to *Enterprise Wheel* and as conflicting with the "policies" of the Fourth and Sixth Circuits. Petitioner has been admirably forthright in conceding that this alleged conflict is not a "classic" one. Respondents submit, however, that the alleged conflict among the circuits in their standards of judicial review of labor arbitration awards does not exist at all.

The Third Circuit's decision in *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F. 2d 1123 (3d Cir. 1969), is perhaps the most comprehensive and searching analysis of *Enterprise Wheel* and other decisions relating to judicial review of arbitration awards undertaken by a Court of Appeals. It is, of course, the seminal case on the subject in this circuit and has spawned numerous progeny. *See, e.g., Teamsters Local Union No. 30 v. Helms Express Inc.*, 591 F. 2d 211 (3d Cir. 1979); *Teamsters Local 249 v. Western Pennsylvania Motor Carriers Ass'n.*, 574 F. 2d 783 (3d Cir. 1978); *N. F. & M. Corp. v. United Steelworkers*, 524 F. 2d 756 (3d Cir. 1975); *Amal. Meatcutters v. Cross Bros.*, 518 F. 2d 1113 (3d Cir. 1975); *Local 103, I. U. E. v. RCA Corp.*, 516 F. 2d 1336 (3d Cir. 1975). Each of these cases has, like *Ludwig Honold*, faithfully applied the principles of *Enterprise Wheel* to the particular case before the court. Indeed it is noteworthy that the two Sixth Circuit cases cited by petitioner as sharply divergent in approach

from *Ludwig Honold* both cite to *N. F. & M. Corp., supra*, as supporting authority for their holdings. *See Storer Broadcasting Co. v. AFTRA*, 600 F. 2d 45, 47 (6th Cir. 1979); *Detroit Coil v. IAM etc.*, 594 F. 2d 575, 579 (6th Cir. 1979). The decision in *N. F. & M. Corp., supra*, was one which took a very "restrictive" approach to judicial disturbance of labor arbitration awards and in so doing followed *Enterprise Wheel* and *Ludwig Honold* quite literally. *See* 524 F. 2d at 759-760.

Moreover, the allegedly conflicting decisions of the Fourth and Sixth Circuits are perfectly correct applications of *Enterprise Wheel's* guidelines to the rather egregious examples of abuse of authority by the arbitrators in those cases. The Third Circuit would without doubt have reached identical results under *Ludwig Honold* had those cases arisen within its jurisdiction. *Storer Broadcasting Co., supra*, involved factual determinations by an arbitrator which had no evidentiary support whatsoever in the record before him. In *Detroit Coil Co., supra*, the challenged rulings of the arbitrator lacked any evidentiary support and contravened clear contractual mandate. The latter defect was also fatal to the arbitration awards in *Drivers' Local 89 v. Hays and Nicoulin, Inc.*, 594 F. 2d 1093 (6th Cir. 1979) and *Monongahela Power Co. v. IBEW*, 566 F. 2d 1196 (4th Cir. 1976), where the arbitrators sought to substitute their judgment on matters reserved to managerial prerogative. In *Baltimore Regional Joint Board v. Webster Clothes, Inc.*, 596 F. 2d 95 (4th Cir. 1979) and *Westinghouse Electric Corp. v. IBEW, Local 1805*, 561 F. 2d 521 (4th Cir. 1977), the arbitration awards were overturned because the applicable collective bargaining agreements did not provide for the awarding of punitive damages for their breach.

The scrutiny of the merits of the arbitration awards undertaken by the Fourth and Sixth Circuits in these cases

was not nearly so penetrating as petitioner's laudatory characterizations would have the Court believe. Indeed, those courts could not engage in any review of the merits beyond the "essence test" without running afoul of *Enterprise Wheel*. Contrary to petitioner's interpretation of those cases, the opinions of the respective courts of appeals therein certainly do not represent any vanguard approach to the judicial review issue nor do they reveal any significant analytic departure from *Ludwig Honold* and its progeny. Those cases, like the instant one, turned on their idiosyncratic facts as measured in light of the controlling principles of *Enterprise Wheel*. The perhaps fortuitious fact that more aberrant arbitration awards have been rendered and reversed in the Fourth and Sixth Circuits than in the Third Circuit hardly demonstrates that the Third Circuit has lapsed into a judicial coma in recent years, as petitioners seem to suggest.

In the absence of any true conflict among the circuit courts of appeals on the issue of the proper standards for judicial review of labor arbitration awards within the meaning of Supreme Court Rule 19(1)(b), respondents respectfully submit that this Court need not and should not accept this case for review.

CONCLUSION.

Respondents respectfully submit that this Court should deny the petition for a writ of certiorari.

Respectfully,

HOWARD S. SIMONOFF,
STEVEN K. KUDATZKY,
TOMAR, PARKS, SELIGER, SIMONOFF & ADOURIAN,
41 South Haddon Avenue,
Haddonfield, New Jersey 08033

Attorneys for Respondents, Retail Clerks International Association Locals 1349, 1358, 1360, 1361, 1371 & 1393.